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## Proposed Regulation Agency Background Document

<b>Agency name</b>	Department of Labor and Industry/Safety and Health Codes Board
<b>Virginia Administrative Code (VAC) citation</b>	16 VAC 25 -60
<b>Regulation title</b>	Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program
<b>Action title</b>	Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program
<b>Document preparation date</b>	September 15, 2005

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.*

This proposed amendment to the Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program clarifies definitions and other procedural actions listed in the regulation. It adds statutory references applicable to public sector employers and employees and corrects omissions in listing of documents covered under notification and posting requirements. It clarifies the disclosability of file documents in contested cases prior to the issuance of a final order. It clarifies the eligibility of a person to file a complaint, and modifies requirements for classifying and responding to complaints to correspond with the parallel procedures of federal OSHA. The proposed amendment requires employers to comply with manufacturer's specifications, requirements and limitations on all machinery, equipment, vehicles, materials and tools where not superseded by specific and more stringent VOSH regulations. The proposed amendment clarifies what constitutes "agricultural operations" in the agricultural industry. It also further clarifies application of the statutory requirement to issue citations within 6 months of the occurrence of any alleged violation. The proposed amendment codifies in regulation the multi-employer worksite citation policy and multi-employer defense;

and it removes the direct involvement of the Commissioner of Labor and Industry in the determination of extension of abatement times.

**Legal basis**

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.*

The Safety and Health Codes Board is authorized by Title 40.1-22(5) “to adopt, alter, amend, or repeal rules and regulations to further, protect and promote the safety and health of employees in places of employment over which it has jurisdiction and to effect compliance with the federal OSH Act of 1970...as may be necessary to carry out its functions established under this title.

In making such rules and regulations to protect the occupational safety and health of employees, the Board shall adopt the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence that no employee will suffer material impairment of health or functional capacity.

However, such standards shall be at least as stringent as the standards promulgated by the federal OSH Act of 1970 (P.L.91-596). In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experiences gained under this and other health and safety laws.”

**Purpose**

*Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal and the problems the proposal is intended to solve.*

The Administrative Regulations lay out the rules and basic parameters of employer and employee responsibilities and how to redress issues with the VOSH Program in cases of disagreement. The purpose of the amendments is to provide greater specificity and clarity of regulatory intent; to comply with changes to statutory law, address procedural, jurisdictional, or other administrative changes, and respond to judicial decisions that have occurred since the Administrative Regulations were revised.

**Substance**

*Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the “Detail of changes” section.)*

The proposed amendments to 16 VAC 25-60-30, Applicability to Public Employers, clarifies that public sector employers and employees are subject to the same potential criminal sanctions as private sector employers and employees under Va. Code §40.1-10 for not cooperating with or otherwise obstructing a VOSH inspection or investigation. The proposed amendment will provide the VOSH program with an enforcement tool to compel a political subdivision to allow the Department to conduct an enforcement inspection, were the political subdivision to refuse its consent to allow an inspection. In 16 VAC 25-60-120, 130, 140 and 150, the proposed amendment will provide an additional enforcement tool for the Commissioner to prevent the recurrence of accidents by requiring employers to comply with manufacturer's specifications and limitations during operation and use of machinery, vehicles, tools, materials and equipment, and assuring that such items, when not functioning properly, are removed from service until the condition is corrected. In 16 VAC 25-60-140 the proposed amendment clarifies what constitutes "agricultural operations" in the agricultural industry. In 16 VAC 25-60-260, Issuance of Citation and Proposed Penalty, guidance on how to apply the requirement in Va. Code §40.1-49.4.A.3 (calculating the six months time frame) is provided. Lastly, the proposed amendment adds new subsections F and G to section 260 to codify the Department's longstanding multi-employer worksite citation policy and multi-employer defense.

## Issues

*Please identify the issues associated with the proposed regulatory action, including:*

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

*If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.*

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There are no significant advantages and/or disadvantages to the regulated community, the public or the Department as the proposed regulation primarily codifies current and longstanding VOSH policies, interpretations and procedures. With respect to the proposed amendments to §260, codifying the multi-employer citation policy and defense, there will be an impact only on employers that fall into the category of a "controlling" employer, as the current policy does not apply to them by virtue of the Court of Appeals decision in *C. Ray Davenport v. Summit Contractors* referenced in the briefing package of this proposed regulation. It is estimated that 1% or less of the more than 3,000 VOSH inspections conducted on an annual basis concern the application of the multi-employer citation policy to "controlling" employers.

## Economic impact

*Please identify the anticipated economic impact of the proposed regulation.*

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As the proposed changes primarily reflect previously longstanding VOSH enforcement policies, interpretations or procedures or reflect current statutory requirements which impact the program, it is anticipated that there are no significant additional costs issues associated with adoption of the regulation.

The proposed amendment to §150, Maritime Standards, to include references to 29 C.F.R. 1918 and 1919 standards (Longshoring-public sector only, and Gear Certification-public sector only, respectively) could eventually result in cost increases for public sector employers in those industries. However, research at this point indicates that there are currently no public sector employees in those industries.

The proposed amendments to §260 codifying the multi-employer citation policy and defense can result in some cost increases for employers that fall into the category of a “controlling” employer who was also acting as a general contractor, as the current policy does not apply to them by virtue of the *Summit* decision referenced above. It is estimated that 1% or less of the more than 3,000 VOSH inspections conducted on an annual basis concern the application of the multi-employer citation policy to “controlling” employers. The additional cost would be in the form of potential citations and penalties issued by the Department in the estimated 1% of cases that could be affected under the proposed amendment.

<p><b>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures</b></p>	<p>The projected cost to the state to implement and enforce the proposed regulatory changes is zero. The changes represent increased clarification of current processes, housekeeping changes or other minor variations on procedures already implemented and add no additional financial burden to the agency.</p>
<p><b>Projected cost of the regulation on localities</b></p>	<p>Since we have pulled out the willful and criminal willful penalty sections, the cost to localities should be negligible. The proposed amendment to §150, Maritime Standards, to include references to 29 C.F.R. 1918 and 1919 standards (Longshoring-public sector only, and Gear Certification-public sector only, respectively) could eventually result in cost increases for public sector employers in those industries. At this time, research indicates that there are no public sector employers or employees in these two industries so there should be no associated costs at this time.</p>
<p><b>Description of the individuals, businesses or other entities likely to be affected by the regulation</b></p>	<p>VOSH jurisdiction extends to approximately 197,730 employers and 3,375,318 employees.</p>
<p><b>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected.</b> Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>VOSH jurisdiction extends to 197,730 employers and 3,375,318 employees. The large majority of Virginia’s employers (an estimated 95% or higher) qualify as small businesses.</p>
<p><b>All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.</b></p>	<p>As the large majority of the proposed changes primarily reflect previously longstanding VOSH enforcement policies, interpretations or procedures or reflect current statutory requirements which impact the program, it is anticipated that there are no significant additional cost issues associated with adoption of the regulation.</p>

	<p>The proposed amendments to §260, codifying the multi-employer citation policy and defense, can result in some cost increases for employers that fall into the category of a “controlling” employer who was also acting as a general contractor, as the current policy does not apply to them by virtue of the Virginia Court of Appeal’s decision, <i>C. Ray Davenport, Commissioner of Labor and Industry v. Summit Contractors</i>, on May 3, 2005. It is estimated that 1% or less of the approximately 2,700 to 3,000 VOSH inspections conducted on an annual basis concern the application of the multi-employer citation policy to “controlling” employers. The additional cost would be in the form of potential citations and penalties issued by the Department in the estimated 1% of cases that could be affected under the proposed amendment. Based on data for average penalties per inspection, we estimate the cost for this provision to be approximately \$46,845 for the affected employers.</p>
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**Alternatives**

*Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.*

As an alternative to promulgating this regulation, the Administrative Regulations could remain unchanged, however, the proposed revisions are essential to provide greater clarity of current regulatory intent, to codify in regulation the Department’s longstanding multi-employer worksite policy for citation issuance, and to increase the protection of employees by requiring that employers use manufacturer’s guideline for machinery, equipment, vehicles, materials and tools where no overriding specific regulations exist.

The multi-employer worksite policy dates to the late 1970's and is a high profile issue at both the state and federal levels, even though it affects a relatively small percentage of VOSH inspections (VOSH annually conducts over 3,000 inspections per year and the decision is estimated to affect approximately 1% or fewer of those cases). The Occupational Safety and Health Act of 1970 (“OSH Act”) and federal regulations require VOSH laws, regulations and policies to be “as effective as” those of federal OSHA (see 29 CFR 1902.4). Since 1988, the VOSH Program has had a fully approved State Plan under §18(e) of the OSH Act with exclusive jurisdiction over worksites covered by the Virginia State Plan. The Court’s invalidation of part of the VOSH Program’s multi-employer citation policy potentially places that portion of the VOSH Program in violation of the "as effective as" requirement. Were the VOSH Program to be eventually found in violation of the “as effective as” requirement, the potential exists for federal OSHA to reassert federal enforcement jurisdiction.

**Public comment**

*Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.*

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No public comments were received during the NOIRA comment period.

**Family impact**

*Please assess the impact of the proposed regulatory action on the institution of the family and family stability.*

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This proposed regulation has no potential impact on the institution of the family or family stability.

**Detail of changes**

*Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.*

*If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.*

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For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
16 VAC 25-60-10		<p><i>"Abatement period"</i> means the period of time permitted for correction of a violation.</p> <p><i>"Commissioner"</i> means the Commissioner of Labor and Industry. Except where the context clearly indicates the contrary, any reference to the commissioner shall include his authorized representatives.</p> <p><i>"Commissioner of Labor and Industry"</i> means only the Commissioner of Labor and Industry.</p>	<p><i>"Abatement period"</i> means the period of time <u>defined or set out in the citation</u> <del>permitted</del> for correction of a violation.</p> <p><i>"Commissioner"</i> means the Commissioner of Labor and Industry. Except where the context clearly indicates the contrary, any <u>such</u> reference <del>to the commissioner</del> shall include his authorized representatives.</p> <p><i>"Commissioner of Labor and Industry"</i> means only the <u>individual who is</u> Commissioner of Labor and Industry.</p>

<p>16 VAC 25-60-20</p>	<p><b>"Person"</b> means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.</p> <p><b>"Public employer"</b> means the Commonwealth including its agencies, or any political subdivision or public body.</p> <p>All Virginia statutes, standards, and regulations pertaining to occupational safety and health shall apply to every employer, employee and place of employment in the Commonwealth of Virginia except where:</p> <ol style="list-style-type: none"> <li>1. The United States is the employer or exercises exclusive jurisdiction;</li> <li>2. The federal Occupational Safety and Health Act of 1970 does not apply by virtue of § 4(b)(1) of that Act. The commissioner shall consider Federal OSHA case law in determining where jurisdiction over specific working conditions has been preempted by the regulations of a federal agency; or,</li> <li>3. The employer is a public employer, as that term is defined in these regulations. In such cases, the Virginia laws, standards and regulations governing occupational safety and health</li> </ol>	<p><del><b>"Person"</b> means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons</del> <u>any individual, corporation, partnership, association, cooperative, limited liability company, trust, joint venture, government, political subdivision, or any other legal or commercial entity and any successor, representative, agent, agency, or instrumentality thereof.</u></p> <p><b>"Public employer"</b> means the Commonwealth of <u>Virginia</u>, including its agencies, <u>authorities, or instrumentalities</u> or any political subdivision or public body.</p> <p><b>Rationale:</b> Proposed changes in this section are primarily for clarification purposes and do not involve any substantive changes. The proposed amendment to the definition of "person" in §10 incorporates a change in the statutory definition of "person" in Va. Code §1-230.</p> <p>All Virginia statutes, standards, and regulations pertaining to occupational safety and health shall apply to every employer, employee and place of employment in the Commonwealth of Virginia except where:</p> <ol style="list-style-type: none"> <li>1 <u>A.</u> The United States is the employer or exercises exclusive jurisdiction;</li> <li>2 <u>B.</u> The federal Occupational Safety and Health Act of 1970 does not apply by virtue of § 4(b)(1) of that Act. The commissioner shall consider Federal OSHA case law in determining where jurisdiction over specific working conditions has been preempted by the regulations of a federal agency; or,</li> <li>3 <u>C.</u> The employer is a public employer, as that term is defined in these regulations. In such cases, the Virginia laws, standards and regulations governing occupational safety and health are applicable as stated including §§ 10, 30, 280, 290, and 300 of these regulations.</li> </ol>
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<p><b>16 VAC 25-60-30</b></p>		<p>are applicable as stated including §§ 10, 30, 280, 290, and 300 of these regulations.</p> <p>C. The following portions of Title 40.1 of the <i>Code of Virginia</i> shall apply to public employers: §§ 40.1-49.4.A(1), 40.1-49.8, 40.1-51, 40.1-51.1, 40.1-51.2, 40.1-51.2:1, 40.1-51.3, 40.1-51.3:2, and 40.1-51.4:2.</p> <p>D. Section § 40.1-51.2:2 A of the Code of Virginia shall apply to public employers except that the commissioner shall not bring action in circuit court in the event that a voluntary agreement cannot be obtained.</p> <p>E. Sections §§40.1-49.4.F and 40.1-51.2:2 of the <i>Code of Virginia</i> shall apply to public employers other than the Commonwealth and its agencies.</p>	<p><b>Rationale:</b> Proposed changes in §20 corrects subparagraph numbering and do not involve any substantive changes.</p> <p>C. The following portions of Title 40.1 of the <i>Code of Virginia</i> shall apply to public employers: §§ 40.1-10, 40.1-49.4.A(1), 40.1-49.8, 40.1-51, 40.1-51.1, 40.1-51.2, 40.1-51.2:1, 40.1-51.3, 40.1-51.3:2, and 40.1-51.4:2.</p> <p><b>Rationale:</b> The proposed amendment is to subject public sector employers (and in the case of Va. Code §40.1-10, public sector employees, since that section applies to any “person” found to be in violation) to the same potential criminal sanctions as private sector employers and employees. There does not appear to be any sound policy or legal rationale for shielding public employers/ employees from criminal sanctions when they have engaged in conduct that would otherwise be considered criminal in nature.</p> <p>D. Section § 40.1-51.2:2 A of the Code of Virginia shall apply to public employers except that the commissioner shall not bring action in circuit court in the event that a voluntary agreement cannot be obtained.</p> <p><b>Rationale:</b> Housekeeping change to correct redundancy.</p> <p>E. Sections §§ 40.1-49.4.F, 40.1-49.9, 40.1-49.10, 40.1-49.11, 40.1-49.12, and 40.1-51.2:2 of the <i>Code of Virginia</i> shall apply to public employers other than the Commonwealth and its agencies. Removal of “§§” following the word “Sections” is a housekeeping change.</p> <p><b>Rational:</b> Under the current ARM, the VOSH program has no enforcement tool that would allow the Department to conduct an enforcement inspection were the political subdivision to refuse its consent to allow an inspection. This proposed amendment would allow the Commissioner to pursue an administrative search warrant through the local court system.</p>
<p><b>16 VAC 25-60-40</b></p>		<p>1. Such notice or notices, including all citations, petitions for variances or</p>	<p>± <u>A</u>. Such notice or notices, including all citations, <u>notices of contest</u>, petitions for variances or extensions of abatement periods,</p>

	<p>extensions of abatement periods, orders, and other documents of which employees are required to be informed by the employer under statute or by these regulations, shall be delivered by the employer to any authorized employee representative, and shall be posted at a conspicuous place where notices to employees are routinely posted and shall be kept in good repair and in unobstructed view. The document must remain posted for 10 working days unless a different period is prescribed elsewhere in Title 40.1 of the <i>Code of Virginia</i> or these regulations.</p> <p>2. A citation issued to an employer, or a copy thereof, shall remain posted in a conspicuous place and in unobstructed view at or near each place of alleged violation for three working days or until the violation has been abated, whichever is longer.</p> <p>3. A copy of any written notice of contest shall remain posted until all proceedings concerning the contest have been completed.</p> <p>4. Upon receipt of a subpoena, the employer shall use the methods set forth in this section to further notify his employees and any authorized employee representative of their rights to party status. This written notification shall include both the date, time and place set for court hearing, and any subsequent changes to hearing arrangements. The notification shall remain posted until commencement of the hearing or until an earlier disposition.</p>	<p>orders, and other documents of which employees are required to be informed by the employer under statute or by these regulations, shall be delivered by the employer to any authorized employee representative, and shall be posted at a conspicuous place where notices to employees are routinely posted and shall be kept in good repair and in unobstructed view. The document must remain posted for 10 working days unless a different period is prescribed elsewhere in Title 40.1 of the <i>Code of Virginia</i> or these regulations.</p> <p><del>2</del> <u>B</u>. A citation issued to an employer, or a copy thereof, shall remain posted in a conspicuous place and in unobstructed view at or near each place of alleged violation for three working days or until the violation has been abated, whichever is longer.</p> <p><del>3</del> <u>C</u>. A copy of any written notice of contest shall remain posted until all proceedings concerning the contest have been completed.</p> <p><del>4</del> <u>D</u>. Upon receipt of a subpoena, the employer shall use the methods set forth in this section to further notify his employees and any authorized employee representative of their rights to party status. This written notification shall include both the date, time and place set for court hearing, and any subsequent changes to hearing arrangements. The notification shall remain posted until commencement of the hearing or until an earlier disposition.</p> <p><b><u>Rationale:</u></b> Proposed changes in §40 correct subparagraph numbering and do not involve any substantive changes.</p>
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<p>16 VAC 25-60-80</p>		<p>VA. CODE § 2.1-377 TO - 386</p>	<p>VA. CODE § <u>2.2-3800 to §2.2-3809</u></p> <p><u>Rationale:</u> The proposed change will delete an obsolete reference and change it to the re-designated reference. This is a housekeeping measure and does not involve any substantive change.</p>
<p>16 VAC 25-60-90</p>		<p>D. Issued citations, orders of abatement and proposed penalties are public documents and are releasable upon a written request. All other file documents in cases where a citation has been issued are not disclosable until the case is a final order of the commissioner or the court.</p>	<p>D. Issued citations, orders of abatement and proposed penalties are public documents and are releasable upon a written request. All other file documents in cases where a citation has been issued are not disclosable until the case is a final order of the commissioner or the court; <u>except that once a copy of file documents in a contested case has been provided to legal counsel for the employer in response to a request for discovery, or to a third party in response to a subpoena duces tecum, such documents shall be releasable upon a written request, subject to the exclusions in this regulation and the Virginia Freedom of Information Act.</u></p> <p><u>Rationale:</u> This proposed change is to primarily assist family members of accident victims to obtain documents from VOSH inspection files in a more timely fashion. The current ARM provision does not allow release of documents until the case is closed which can stretch out to a period of years when the case is in litigation. However, once a file has been released to the employer through a discovery request or a litigant in a third-party legal action, any benefit to the Department’s litigation strategy has disappeared and there is no purpose served in maintaining confidentiality.</p>
<p>16 VAC 25-60-100</p>		<p>A. Any person who believes that a safety or health hazard exists in a workplace may request an inspection by giving notice to the commissioner. Written complaints signed by an employee or an authorized representative will be treated as formal complaints. Complaints by persons other than employees and authorized representatives and unsigned complaints by employees or authorized representatives shall be treated as nonformal complaints. Nonformal complaints will</p>	<p>A. <u>An employee or other</u> <del>Any</del> person who believes that a safety or health hazard exists in a workplace may request an inspection by giving notice to the commissioner. <u>Written complaints signed by an employee or an authorized representative will be treated as formal complaints. Complaints by persons other than employees and authorized representatives and unsigned complaints by employees or authorized representatives shall be treated as nonformal complaints. Nonformal complaints will generally be handled by letter and formal complaints will generally result in an inspection.</u></p>

	<p>generally be handled by letter and formal complaints will generally result in an inspection.</p> <p>B. For purposes of this Section and § 40.1-51.2(b) of the Code of Virginia, the representative(s) that will be recognized as authorized by employees for such action shall be:</p> <p>E. A complaint will be classified as formal or nonformal and be evaluated to determine whether there are reasonable grounds to believe that the violation or hazard complained of exists.</p> <p>F. If the commissioner determines that the complaint is formal and offers reasonable grounds to believe that a hazard or violation exists, then an inspection will be conducted as soon as possible. Valid nonformal complaints may be resolved by letter or may result in an inspection if the commissioner determines that such complaint establishes probable cause to conduct an inspection.</p>	<p>B. For purposes of this Section and § 40.1-51.2(b) of the Code of Virginia, the representative(s) that will be recognized as authorized <u>by to act for employees for such action shall</u> can be:</p> <p>E. A complaint will be <del>classified as formal or nonformal and be</del> evaluated to determine whether there are reasonable grounds to believe that the violation or hazard complained of exists.</p> <p><u>F. If the commissioner determines that the complaint is formal and offers reasonable grounds to believe that a hazard or violation exists, then an inspection will be conducted as soon as possible. Valid nonformal complaints may be resolved by letter or may result in an inspection if the commissioner determines that such complaint establishes probable cause to conduct an inspection. The commissioner's response to a complaint will either be in the form of an onsite inspection or an investigation which does not involve onsite response by the Commissioner.</u></p> <p><u>1. Onsite inspections will normally be conducted in response to complaints alleging:</u></p> <ul style="list-style-type: none"> <li><u>a. The complaint was reduced to writing, is signed by a current employee or employee representative, and states the reason for the inspection request with reasonable particularity. In addition, there are reasonable grounds to believe that a violation of a safety or health standard has occurred.</u></li> <li><u>b. Imminent danger hazard;</u></li> <li><u>c. Serious hazard, which in the discretion of the commissioner requires an onsite inspection;</u></li> <li><u>d. Permanently disabling injury or illness related to a hazard potentially still in existence;</u></li> <li><u>e. The establishment has a significant history of non-compliance with VOSH laws and standards;</u></li> <li><u>f. The complaint identifies an establishment or an alleged hazard covered by a local or national emphasis inspection program;</u></li> <li><u>g. A request from a VOSH/OSHA discrimination investigator to conduct an inspection in response</u></li> </ul>
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<p><b>16 VAC 25-60-120</b></p>		<p>The occupational safety or health standards adopted as rules or regulations by the board either directly or by reference, from 29 CFR Part 1910 shall apply by their own terms to all employers and employees at places of employment covered by the Virginia State Plan for Occupational Safety and Health.</p>	<p><u>to a complaint initially filed with the investigator:</u>  <u>h. The employer fails to provide an adequate response to a VOSH investigation contact, or the complainant provides evidence that the employer’s response is false, incorrect, incomplete or does not adequately address the hazard.</u></p> <p><u>2. A complaint investigation, which does not involve onsite activity, shall normally be conducted for all complaints that do not meet the criteria listed in §100.F.1 above.</u></p> <p><u>3. The commissioner reserves the right, for good cause shown, to initiate an inspection with regard to certain complaints that don’t meet the criteria listed in §100.F.1 above; as well as to decline to conduct an inspection and instead conduct an investigation, for good cause shown, when certain complaints are found to otherwise meet the criteria listed in §100.F.1. above.</u></p> <p><u>Rationale:</u> The proposed amendments to §§ A., E., and F. eliminate references to “formal” (signed employee complaints) and “nonformal” complaints (unsigned employee complaints or complaints filed by former employees) and codifies current VOSH procedures which describe complaints as those that are either inspected or investigated. Proposed amendments cause no substantive changes to VOSH policy or procedures.</p> <p>The occupational safety or health standards adopted as rules or regulations by the board either directly or by reference, from 29 CFR Part 1910 shall apply by their own terms to all employers and employees at places of employment covered by the Virginia State Plan for Occupational Safety and Health.</p> <p><u>The employer shall comply with the manufacturer’s specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment; unless specifically superceded by a more stringent corresponding requirement in Part 1910. The use of any machinery, vehicle, tool, material or equipment which is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as</u></p>
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<p><b>16 VAC 25-60-130</b></p>		<p>The occupational safety or health standards adopted as rules or regulations by the Virginia Safety and Health Codes Board either directly, or by reference, from 29 C.F.R. Part 1926 shall apply by their own terms to all employers and employees engaged in either construction work or construction related activities covered by the Virginia State Plan for Occupational Safety and Health.</p> <p>1. For the purposes of the applicability of such Part 1926 standards, the key criteria utilized to make such a decision shall be the activities taking place at the worksite, not the primary business of the employer.</p>	<p><u>unsafe by tagging or locking the controls to render them inoperable, or be physically removed from its place of use or operation.</u></p> <p><u>Rationale:</u> The proposed amendment is to clarify an employer’s current responsibility under the “general duty clause” to comply with manufacturer’s specifications and limitations, as well as allow the use of the new provisions to address “other-than-serious” hazards before they can become serious in nature.</p> <p>The occupational safety or health standards adopted as rules or regulations by the Virginia Safety and Health Codes Board either directly, or by reference, from 29 C.F.R. Part 1926 shall apply by their own terms to all employers and employees engaged in either construction work or construction related activities covered by the Virginia State Plan for Occupational Safety and Health.</p> <p><u>The employer shall comply with the manufacturer’s specification and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment; unless specifically superceded by a more stringent corresponding requirement in Part 1926. The use of any machinery, vehicle, tool, material or equipment which is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable, or physically removed from its place of use or operation.</u></p> <p><u>Rationale:</u> The proposed amendment is to clarify an employer’s current responsibility under the “general duty clause” to comply with manufacturer’s specifications and limitations, as well as allow the use of the new provisions to address “other-than-serious” hazards before they can become serious in nature.</p> <p><del>4</del> <u>A.</u> For the purposes of the applicability of such Part 1926 standards, the key criteria utilized to make such a decision shall be the activities taking place at the worksite, not the primary business of the employer. Construction work shall generally include any building, altering, repairing, improving, demolishing, painting or decorating any structure, building, highway, or</p>
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<p><b>16 VAC 25-60-140</b></p>	<p>Construction work shall generally include any building, altering, repairing, improving, demolishing, painting or decorating any structure, building, highway, or roadway; and any draining, dredging, excavation, grading or similar work upon real property. Construction also generally includes work performed in traditional construction trades such as carpentry, roofing, masonry work, plumbing, trenching and excavating, tunnelling, and electrical work.</p> <p>Construction does not include maintenance, alteration or repair of mechanical devices, machinery, or equipment, even when the mechanical device, machinery or equipment is part of a pre-existing structure.</p> <p>2. Certain standards of 29 C.F. R. Part 1910 have been determined by federal OSHA to be applicable to construction and have been adopted for this application by the board.</p> <p>3. The standards adopted from 29 C.F.R. Part 1910.19 and 29 C.F.R. Part 1910.20 containing respectively, special provisions regarding air contaminants and requirements concerning access to employee exposure and medical records shall apply to construction work as well as general industry.</p> <p>The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 CFR Part 1928 shall apply by their own terms to all employers and employees engaged in either agriculture or agriculture</p>	<p>roadway; and any draining, dredging, excavation, grading or similar work upon real property. Construction also generally includes work performed in traditional construction trades such as carpentry, roofing, masonry work, plumbing, trenching and excavating, <del>tunnelling</del> tunneling, and electrical work. Construction does not include maintenance, alteration or repair of mechanical devices, machinery, or equipment, even when the mechanical device, machinery or equipment is part of a pre-existing structure.</p> <p><u>2</u> <b>B.</b> Certain standards of 29 C.F. R. Part 1910 have been determined by federal OSHA to be applicable to construction and have been adopted for this application by the board.</p> <p><u>3</u> <b>C.</b> The standards adopted from 29 C.F.R. Part 1910.19 and 29 C.F.R. Part 1910.20 containing respectively, special provisions regarding air contaminants and requirements concerning access to employee exposure and medical records shall apply to construction work as well as general industry.</p> <p><u>Rationale:</u> The proposed amendment corrects a typographical error as well as renumbers the paragraphs.</p> <p>The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 CFR Part 1928 and <u>29 CFR Part 1910</u> shall apply by their own terms to all employers and employees engaged in either agriculture or agriculture related activities covered by the Virginia State Plan for Occupational Safety and Health.</p>
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		<p>related activities covered by the Virginia State Plan for Occupational Safety and Health.</p>	<p><u>For the purposes of applicability of such Part 1928 and Part 1910 standards, the key criteria utilized to make a decision shall be the activities taking place at the worksite, not the primary business of the employer. Agricultural operations shall generally include any operation involved in the growing or harvesting of crops or the raising of livestock or poultry, or activities integrally related to agriculture, conducted by a farmer or agricultural employer on sites such as farms, ranches, orchards, dairy farms or similar establishments. Agricultural operations do not include construction work as described in § 130.A. of this regulation; nor does it include operations or activities substantially similar to those that occur in a general industry setting and are therefore not unique and integrally related to agriculture.</u></p> <p><u>The employer shall comply with the manufacturer’s specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment; unless specifically superceded by a more stringent corresponding requirement in Part 1928 or Part 1910. The use of any machinery, vehicle, tool, material or equipment which is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable, or be physically removed from its place of use or operation.</u></p> <p><u>Rationale:</u> The proposed amendment provides further guidance to VOSH personnel, employers and employees concerning the applicability of, and in certain cases, the non-applicability, of the agricultural standards contained in Part 1928. It also reflects current VOSH enforcement policy and is based in part on a definition of “farming operation” contained in Federal OSHA Instruction CPL 2-0.51J. This proposed amendment is also to clarify an employer’s current responsibility under the “general duty clause” to comply with manufacturer’s specifications and limitations, as well as allow the use of the new provisions to address “other-than-serious” hazards before they can become serious</p>
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<p><b>16 VAC 25-60-150</b></p>		<p>The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 C.F.R. Part 1915 and 29 C.F.R. Part 1917, shall apply by their own terms to all public sector employers and employees engaged in maritime related activities covered by the Virginia State Plan for Occupational Safety and Health.</p>	<p>in nature.</p> <p>The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 C.F.R. Part 1915, <del>and</del> 29 C.F.R. Part 1917, <u>29 C.F.R. Part 1918 and 29 C.F.R. Part 1919</u>, shall apply by their own terms to all public sector employers and employees engaged in maritime related activities covered by the Virginia State Plan for Occupational Safety and Health.</p> <p><u>The employer shall comply with the manufacturer’s specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment; unless specifically superseded by a more stringent corresponding requirement in Parts 1915, 1917, 1918 or 1919. The use of any machinery, vehicle, tool, material or equipment which is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable, or be physically removed from its place of use or operation.</u></p> <p><u>Rationale:</u> The proposed amendment is to clarify an employer’s current responsibility under the “general duty clause” to comply with manufacturer’s specifications and limitations, as well as allow the use of the new provisions to address “other-than-serious” hazards before they can become serious in nature.</p>
<p><b>16 VAC 25-60-260</b></p>		<p>A. Each citation shall be in writing and describe with particularity the nature of the violation or violations, including a reference to the appropriate safety or health provision of Title 40.1 of the <i>Code of Virginia</i> or the appropriate rule, regulation, or standard. In addition, the citation must fix a reasonable time for abatement of the violation. The citation will contain substantially the</p>	<p>A. Each citation shall be in writing and describe with particularity the nature of the violation or violations, including a reference to the appropriate safety or health provision of Title 40.1 of the <i>Code of Virginia</i> or the appropriate rule, regulation, or standard. In addition, the citation must fix a reasonable time for abatement of the violation. The citation will contain substantially the following: "NOTICE: This citation will become a final order of the commissioner unless contested within fifteen working days from the date of receipt by the employer." The citation may be delivered to the employer or his agent by the commissioner or may be sent by certified mail or by personal</p>

		<p>following: "NOTICE: This citation will become a final order of the commissioner unless contested within fifteen working days from the date of receipt by the employer." The citation may be delivered to the employer or his agent by the commissioner or may be sent by certified mail or by personal service to an officer or agent of the employer or to the registered agent if the employer is a corporation.</p>	<p>service to an officer or agent of the employer or to the registered agent if the employer is a corporation.</p> <p><u>1. No citation may be issued after the expiration of six months following the occurrence of any alleged violation. The six month time frame is deemed to be tolled on the date the citation is issued by the commissioner, without regard for when the citation is received by the employer. For purposes of calculating the six month time frame for citation issuance, the following requirements shall apply:</u></p> <p><u>Rationale:</u> The proposed amendment is to clarify for employers and employees that in order to comply with Va. Code §40.1-49.4.A.3., the Commissioner only need "issue" the violations within six months of the occurrence of any alleged violation, even if the employer receives the citations several days after the end of the six month period.</p> <p><u>a. The six month time frame begins to run on the day after the incident or event occurred or notice was received by the commissioner (as specified below), in accordance with Va. Code §1-210.A. The word "month" shall be construed to mean one calendar month in accordance with Va. Code §1-223.</u></p> <p><u>Rationale:</u> The proposed amendment is to clarify for employers and employees how the six month time frame is calculated by specifically referencing Code of Virginia provisions that apply to computation of time in statutes.</p> <p><u>b. An alleged violation is deemed to have "occurred" on the day it was initially created by commission or omission on the part of the creating employer, and every day thereafter that it remains in existence uncorrected.</u></p> <p><u>Rationale:</u> The proposed amendment is to clarify for employers and employees that for purposes of calculating the six month time frame for issuing a</p>
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		<p>citation, the date a violation occurred includes not only the first day that it was created, but also every day thereafter that the violation continues to go uncorrected</p> <p><u>c. Notwithstanding b. above, if an employer fails to notify the commissioner of any work-related incident resulting in a fatality or in the in-patient hospitalization of three or more persons within eight hours of such occurrence as required by Va. Code §40.1-51.1.D, the six month time frame shall not be deemed to commence until the commissioner receives actual notice of the incident.</u></p> <p><u>Rationale:</u> The proposed amendment is to clarify for employers and employees that the six month time frame for issuing a citation in response to fatal or catastrophic accident, as defined in Va. Code §40.1-51.1.D. , does not begin until the Commissioner receives actual notice of the accident.</p> <p><u>d. Notwithstanding b. above, if the Commissioner is first notified of a work-related incident resulting in an injury or illness to an employee(s) through receipt of an Employer’s Accident Report (EAR) form from the Virginia Workers’ Compensation Commission as provided in Va. Code § 65.2-900, the six month time frame shall not be deemed to commence until the commissioner actually receives the EAR form.</u></p> <p><u>Rationale:</u> The proposed amendment is to clarify for employers and employees that the six month time frame for issuing a citation in response to an inspection that the six month time frame for issuing a citation in response to an inspection that the Commissioner initiated following receipt of an Employer’s Accident Report (EAR) does not begin until the Commissioner receives actual notice of the accident.</p> <p><u>e. Notwithstanding b. above, if the Commissioner is first notified of a work-related hazard, or incident resulting in an injury or illness to an employee(s), through receipt of a complaint in accordance with §100 of these regulations, or referral, the six month time frame shall not be deemed to commence until the commissioner actually receives the complaint or referral.</u></p> <p><u>Rationale:</u> The proposed amendment is to clarify for employers and employees that the six month</p>
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		<p>time frame for issuing a citation in response to an inspection that the Commissioner initiated following receipt of complaint or referral does not begin until the Commissioner actually receives the complaint or referral.</p> <p><u>F. On multi-employer worksites for all covered industries, citations shall normally be issued to an employer whose employee is exposed to an occupational hazard (the exposing employer). Additionally, the following employers shall normally be cited, whether or not their own employees are exposed:</u></p> <ol style="list-style-type: none"> <li><u>1. The employer who actually creates the hazard (the creating employer):</u></li> <li><u>2. The employer who is either:</u> <ol style="list-style-type: none"> <li><u>a. responsible, by contract or through actual practice, for safety and health conditions on the entire worksite, and has the authority for ensuring that the hazardous condition is corrected (the controlling employer); or</u></li> <li><u>b. responsible, by contract or through actual practice, for safety and health conditions for a specific area of the worksite, or specific work practice, or specific phase of a construction project, and has the authority for ensuring that the hazardous condition is corrected (the controlling employer);</u></li> </ol> </li> <li><u>3. The employer who has the responsibility for actually correcting the hazard (the correcting employer).</u></li> </ol> <p><u>Rationale:</u> The proposed amendment is to codify VOSH’s longstanding enforcement policy for the issuance of citations in multi-employer worksite situations. In a recent Virginia Court of Appeals case, the VOSH Program’s multi-employer citation policy was upheld in part and overturned in part. The court’s invalidation of part of the VOSH Program’s multi-employer citation policy potentially places that portion of the VOSH Program in violation of the “as effective as” requirement of the OSH Act of 1970 and federal regulations which require VOSH laws, regulations and policies to be “as effective as” those of federal OSHA.</p> <p><u>G. A citation issued under subsection F. to an exposing employer who violates any VOSH law, standard, rule or regulation shall be vacated if</u></p>
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<p>16 VAC 25-60-340</p>	<p>commissioner will attempt to resolve the issue in accordance with § 330 of these regulations. If the matter is not settled or settlement does not appear probable, the Commissioner of Labor and Industry will hear the objections in the manner set forth at subsection I below.</p> <p>I. An employee's objection not resolved under Subsection G of this section or an employer or employee appeal under Subsection H will be heard by the Commissioner of Labor and Industry using the procedures of §§ 2.2-4019 and 2.2-4021 of the <i>Code of Virginia</i>. Burden of proof for a hearing under subsection G shall lie with the employer. Burden of proof for an appeal under subsection H shall lie with the party seeking review.</p> <p>2. Within 15 working days of the hearing, all parties will be advised of the Commissioner of Labor and Industry's decision.</p> <p>3. Since the issue is whether the Commissioner of Labor and Industry will exercise his enforcement discretion, no further appeal is available.</p> <p>C. Where a settlement with the employer is reached before the 15th working day after receipt of a citation, order of abatement, or proposed civil penalty, and no notice of contest has been filed, the commissioner shall forthwith amend the citation, order of abatement, or proposed civil penalty, as agreed. The amended citation shall bear a title to indicate that it has been amended and the amended citation or an accompanying</p>	<p>accordance with § 330 of these regulations. If the matter is not settled or settlement does not appear probable, <del>the Commissioner of Labor and Industry will hear the</del> objections <u>will be heard</u> in the manner set forth at subsection I below.</p> <p><u>Rationale:</u> The proposed amendment is for clarification and procedural purposes.</p> <p>I. An employee's objection not resolved under subsection G of this section or an employer or employee appeal under Subsection H will be heard <del>by the Commissioner of Labor and Industry</del> using the procedures of §§ 2.2-4019 and 2.2-4021 of the <i>Code of Virginia</i>. Burden of proof for a hearing under subsection G shall lie with the employer. Burden of proof for an appeal under subsection H shall lie with the party seeking review.</p> <p><u>Rationale:</u> The proposed amendment is for clarification and procedural purposes.</p> <p>2. <del>Within 15 working days of the hearing, all</del> <u>All</u> parties will be advised of the <del>Commissioner of Labor and Industry's</del> decision <u>within 15 working days of the hearing.</u></p> <p>3. <del>Since the issue is whether the Commissioner of Labor and Industry will exercise his enforcement discretion, no further appeal is available.</del></p> <p>C. Where a settlement with the employer is reached before the 15th working day after receipt of a citation, order of abatement, or proposed civil penalty, and no notice of contest has been filed, the commissioner shall forthwith <del>amend</del> <u>prepare a settlement agreement noting any changes to</u> the citation, order of abatement, or proposed civil penalty, as agreed. The <del>amended citation shall bear a title to indicate that it has been amended and the amended citation or an accompanying</del> agreement shall contain a statement to the following effect: "<del>This citation has been amended by agreement between the commissioner and the employer named above.</del> As part of the written agreement, the employer</p>
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	<p>agreement shall contain a statement to the following effect: "This citation has been amended by agreement between the commissioner and the employer named above. As part of the written agreement, the employer has waived his right to file a notice of contest to this order. This agreement shall not be construed as an admission by the employer of civil liability for any violation alleged by the commissioner."</p> <p>D. Following receipt of an employer's timely notice of contest, the commissioner will immediately notify the appropriate Commonwealth's Attorney and may delay the initiation of judicial proceedings until settlement opportunities have been exhausted.</p> <p>1. During this period, the commissioner may amend the citation, order of abatement, or proposed civil penalty through the issuance of an amended citation. Every such amended citation shall bear a title to indicate that it has been amended and the amended citation or the accompanying agreement shall contain a statement to the following effect: "This amended citation is being issued as a result of a settlement between the commissioner and the employer. The employer, by his signature below, agrees to withdraw his notice of contest filed in this matter and not to contest the amended citation. This agreement shall not be construed as an admission by the employer of civil liability for any violation alleged by the commissioner."</p> <p>E. Employees or their representative have the right to</p>	<p>has waived his right to file a notice of contest to this order. This agreement shall not be construed as an admission by the employer of civil liability for any violation alleged by the commissioner."</p> <p><u>Rationale:</u> The proposed amendment is primarily procedural and provides clarification, and does not involve any substantive changes to VOSH operations.</p> <p>D. Following receipt of an employer's timely notice of contest, the commissioner will immediately notify the appropriate Commonwealth's Attorney and may delay the initiation of judicial proceedings until settlement opportunities have been exhausted.</p> <p>1. During this period, the commissioner may <u>agree to</u> amend the citation, order of abatement, or proposed civil penalty, <del>through the issuance of an amended citation. Every such amended citation shall bear a title to indicate that it has been amended and the amended citation or the accompanying</del> <u>The settlement</u> agreement shall contain a statement to the following effect: " <del>This amended citation is being issued as a result of a settlement between the commissioner and the employer.</del> The employer, by his signature below, agrees to withdraw his notice of contest filed in this matter and not to contest the amended citation. This agreement shall not be construed as an admission by the employer of civil liability for any violation alleged by the commissioner."</p> <p>E. Employees or their representative have the right to contest abatement orders arising out of</p>
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		<p>contest abatement orders arising out of settlement negotiations if the notice is timely filed with the commissioner within 15 working days of issuance of the amended citation and abatement order. Upon receipt of a timely notice of contest the commissioner will initiate judicial proceedings.</p>	<p>settlement negotiations if the notice is timely filed with the commissioner within 15 working days of issuance of the <u>agreement</u> <del>amended citation</del> and abatement order. Upon receipt of a timely notice of contest the commissioner will initiate judicial proceedings.</p> <p><u>Rationale:</u> The proposed amendment is primarily procedural and provides clarification, and does not involve any substantive changes to VOSH operations.</p>
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